No. 862016

IN THE

Supreme Court of the United States

GREG MYERS, et al,

Petitioners,

vs.

R. KATHLEEN MORRIS, et al,

Respondents.

and

DONALD BUCHAN, et al.,

Petitioners,

vs.

R. KATHLEEN MORRIS, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE UNITED STATES

BRIEF OF RESPONDENTS MORRIS, BUSCH, ET AL IN OPPOSITION

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1987—Northwest Printing Co., 3010 2nd St. No., Minneapolis, MN 55411—588-7506

OPINIONS IN THE COURTS BELOW

The opinion of the District Court (Joint Appendix G) is reported at 618 F Supp. 1534 (D. Minn. 1985). The opinion of the Court of Appeals for the Eighth Circuit (Joint Appendix F) is reported at 810 F 2nd 1437 (8th Cir. 1987).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

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STATEMENT OF CASE

The facts of the case are accurately and comprehensively set forth in the decision of the Court of Appeals (Joint Appendix F, at F-14 to F-20). In contrast, Petitioners' Statement of the Case is misleading, unsupported by evidence in the record and completely unreliable.

ARGUMENT
INTRODUCTION

Respondent Morris respectfully requests that the Petition for a Writ of Certiorari be denied upon the grounds that the decision of the Court of Appeals for the Eighth Circuit is in conformance with the law of this Court and does not conflict in any material way with the decisions of any other federal Court of appeals on the same issue.

In responding to the Petition filed herein, it is not possible or practical to respond to the largely testimonial assertions concerning the alleged misconduct of these Respondents. The Petitioners' Statement of the Case is, in truth, but an embellishment of the conclusory allegations that were set forth in the original complaints. We must rely upon the carefully written opinion of the Eighth Circuit for a summary of the facts which form the record in this case. Each and every statement of fact appearing in the Court's opinion is amply supported in that Record.

Because of Petitioners' repeated assertion that the immunity issues for these public officials were decided prematurely and that the Court of Appeals acted as a "super jury" (Petition, p. 19), and because of Petitioners' unwarranted suggestions that they were somehow ambushed by the dispositive motions for relief filed by these public officials, it is appropriate to underline the fact that the Court of Appeals had before it "a massive multi-volume fact-filled record" (Appendix F-19).

These cases arise out of the Jordan sex investigation that took place within Scott County, Minnesota in 1983-84. Multiple adults were charged with child sex abuse as a result of the investigation and, in some instances, children were temporarily removed from parental homes pend-

ing the outcome of the criminal proceedings. In each of the criminal cases, massive discovery was undertaken. One of the cases went to trial and involved lengthy testimony from many of the very parties who have been sued in these cases. Several family court cases were tried and massive pre-trial discovery was accomplished in connection with those proceedings. After the dismissal of all of the cases in October, 1984 for reasons more fully set forth in the decision of the Court of Appeals, a massive investigation of the Jordan sex investigation was undertaken by the Attorney General for the State of Minnesota and that investigation generated multiple volumes of documentary evidence concerning every thing that the public officials had done in connection with the Jordan affair.

Petitioners, therefore, had an unprecedented amount of "discovery" available to them before they ever even filed suit. What is more, after the trial court denied the dispositive motions filed by Respondents, massive discovery was undertaken in these cases over objection of these parties. Upon motion made to the Circuit Court, the record was expanded with evidence generated during discovery in these proceedings.

Accordingly, the argument made in the Court of Appeals and by Petitioners here that the immunity issues were determined in a factual vacuum is disingenuous. There was an ample record before the Court of Appeals when it addressed the issues presented herein.

1.

ABSOLUTE IMMUNITY FOR COUNTY ATTORNEY

The Court of Appeals has determined that the challenged conduct of the County Attorney was well within the scope of her duties as an advocate and was part of the prosecutorial function. Petitioners' assertions to the contrary are easily answered by pointing out that the first of the criminal charges against the Jordan adult defendants were brought in late September, 1983 and these were followed by multiple additional charges against additional adults through January, 1984. The police investigation into these cases led to additional charges against additional adults, including these Petitioners in February and June, 1984. The challenged activities of the County Attorney involved her pre-trial contacts with child witnesses who would be key state's witnesses in the cases charged in late 1983 as well as in the cases charged after January, 1984. A County Attorney has a right and duty to meet with child witnesses for purposes of evaluating her cases and for trial preparation. When the prosecutor does this, she functions as an advocate and her activities are clearly protected under the shield long recognized at common law and by this Court in *Imbler v. Pachtman,* 424 U.S. 409, 430 (1976). The decision of the Eighth Circuit granting absolute immunity to Respondent Morris is well within the parameters established in *Imbler*. This case does not even come close to presenting facts that would justify review by this Court for purposes of more sharply defining those "investigative" activities of a county attorney which may not be absolutely protected.

Petitioners have alleged that the County Attorney withheld or suppressed "exculpatory evidence" and that absolute immunity is not available in respect to such activity. The Eighth Circuit addresses that issue at great length (Joint Appendix F-25-27). Contrary to the Petitioners' assertion at page ten of the Petition, the Eighth Circuit did not hold that absolute immunity would be available in regard to the withholding or destruction of exculpatory evidence. To the contrary, the Court held that even if that occurred in this case, the evidence allegedly destroyed did not result in constitutional injury to the Petitioners. Accordingly, the decision of the Eighth of the Circuit is *not* at odds with that of the Third Circuit in *Henderson v. Fisher*, 631 F. 2d 1115 (3rd Cir. 1980) as wrongly stated by Petitioners.

2.

TEMPORARY SEPARATION OF FAMILIES AND IMMUNITY OF PUBLIC OFFICIALS

Immunity was also extended to these respondents in connection with the claim that familial liberty interests were harmed when suspected child abuse victims were removed from the homes of suspected child abusers. Petitioners accuse the Eighth Circuit of having deviated from this Court's teaching in *Santosky v. Kramer*, 455 U.S. 745. 753, (1982), *Lehr v. Robertson*, 463 U.S. 248 (1983) and in other cases concerning the fundamental liberty interest of parents in the continuing care, custody, and management of their children. The Eighth Circuit, however, did not ignore this Court's law on the subject and explicitly referred to *Lehr* in the course of its opinion (Joint Appen-

dix F-52). What is far more important, however, is the fact that these Petitioners have never disputed that they had numerous procedural and substantive rights available to them in the family courts and under Minnesota law which permitted them to challenge in court the actions of the public officials at every turn in the road. The Petitioners have *never* lodged a constitutional challenge in respect to the state statutes, court rules, and administrative regulations under which these public officials proceeded. One of these statutes, Minn. Stat. 260.165, is not even referenced in the Petition and yet it was the cornerstone upon which the police officers relied when they took protective custody of the Petitioners' children. That statute mandates that a police officer having a "reasonable belief" that a child's welfare is jeopardized by his or her continued presence in the parental home should be removed pending a custody hearing in Family Court.

The rights of accused parents and suspected child victims must necessarily be balanced by public officials charged by state law with protecting children suspected of child abuse. The Court of Appeals for the Eighth Circuit has merely held that when such a balancing process must be undertaken by a police officer, then it can hardly be said that the parental right to the continued custody of the child is "clearly established". That being the case, qualified immunity was mandated based upon *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). The Petitioner has failed to direct this Court's attention to any Circuit Court decisions that hold that public officials are not entitled to qualified immunity under facts and in respect to claims similar to those presented here.

3.

NO FACTUAL SUPPORT FOR CONSPIRACY CLAIMS

The conspiracy claims asserted by Petitioners fall, of course, like a house of cards in the absence of record evidence showing concerted action by two or more persons directed towards some unlawful purpose. Contrary to the assertions of the Petitioners, the Eighth Circuit dismissed the conspiracy claims not solely because of a determination that the actors were immune but, instead, because of the fact "that the pleadings and record are deficient to create a triable issue as to the participation by any of the defendants in these appeals in a conspiracy to violate the plaintiffs' civil rights" (Joint Appendix F-37).

These Petitioners were not handicapped by any early filing of these dispositive motions. To the contrary, they were the beneficiaries and recipients of volumes of facts, reports, and analyses of the Jordan investigation before they ever filed thir civil suits. If there was any evidence to support the conspiracy allegations in their complaint, they could and should have presented it to the lower courts. There is no reason why this Court should review the decision of the Circuit Court since it is consistent with case law across the land and supported by decisions such as that of this Court in *Celotex Corporation v. Catrett*, 106 S. Ct. 2548 (1986). Spurious references to Watergate do nothing to enhance Petitioners' right to review.

4.

NEGLIGENCE/DUE PROCESS CLAIMS

Petitioners seek review of the decision dismissing Petitioners' negligence claims. At the risk of sounding like a

broken record, the Court of Appeals was correct in concluding that a detailed search of the record failed to demonstrate the existence of any facts to support such claims. These is no conceivable reason why this Court should undertake a Review of that determination. It is not at odds with any controlling rule of law of this Court nor does it conflict with the decisions of any other circuit court.

5.

QUALIFIED IMMUNITY FOR POLICE OFFICERS

The late issue raised by Petitioners addresses the immunity that has been extended to the police officers in this matter. The Eighth Circuit's decision came close upon the heels of this Court's pronouncement in *Malley v. Briggs,* 106 S. Ct. 1092 (1986) and precedes this Court's more recent pronouncements in *Anderson v. Creighton,* 55 L.W. 5092 (85-1520, decided June 25, 1987).

Anderson came to this Court after a pre-discovery dismissal motion was made and granted in the Trial Court. The Eighth Circuit Court of Appeals reversed but this Court has now held that the reversal was error. Borrowing from language in *Anderson:*

> "whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the 'objective legal reasonableness' of the action, ***, assessed in light of the legal rules that were 'clearly established' at the time it was taken . . . It should not be surprising . . . that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized and hence more relevant, since: the contours of the right

> must be sufficiently clear that a reasonable official would understand that what he is doing violates that right". *Anderson,* supra, 55 L.W., at 5093.

Judge Ross' analysis of the qualified immunity issue reflects just such a "more particularized" evaluation of whether or not the rights claimed to have been violated in this case were "clearly established". Respondents cannot improve upon Judge Ross' description of the unsettled state of the law in the area of child sex abuse and the controversy raging over how such crimes should be properly investigated. In short, the decision of the Eighth Circuit is in accord with the law of this Court and does not deviate on this issue from the decisions of any sister circuits. Review by this Court is not appropriate under the standards set forth in Rule 17.

CONCLUSION

Respondents County Attorney and sheriff's officers respectfully request that the Petition for a Writ of Certiorari be, in all respects, denied.

Respectfully submitted,

July 9, 1987

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